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Grand Jury

upon the purpose behind the SCI provision in the CPL statute, concluded that because the statute and constitutional provisions are time saving devices and an aid in eliminating unnecessary grand jury proceedings, it was inconsistent to allow for such a waiver after grand jury proceedings have already taken place. On the federal level, although an information has not particularly been referred to as a time saving device, courts have at least recognized the constitutionality of a waiver of indictment in favor of prosecution based on an information. Thus, an information has been held to be constitutional on both the federal and state levels.

People v. Menchetti[754]
(decided September 19, 1990)

Defendant challenged the validity of the superior court information,[755] to which he pleaded guilty, on the grounds that the information charged him with a different offense than that in the felony complaint for which he was being held for grand jury indictment. The defendant alternatively alleged that even if the information may properly charge a defendant with a lesser included offense than that in the felony complaint, the information in question is still defective because criminal possession in the fourth degree is not a lesser included offense of criminal possession in the third degree.

The court of appeals held that the superior court information (SCI) was valid because the information can charge a defendant with a lesser included offense so long as the defendant is also being charged with that lesser included offense in the felony complaint.[756] Moreover, the court held that criminal possession in the fourth degree is a lesser included offense of criminal possession in the third degree, because one cannot commit criminal possession in the third degree without simultaneously committing criminal possession in the fourth degree.[757]

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754. 76 N.Y.2d 473, 561 N.E.2d 536, 560 N.Y.S.2d 760 (1990).

755. *See* N.Y. CRIM. PROC. LAW § 195.10(1) (McKinney 1982).

756. *Menchetti*, 76 N.Y.2d at 478, 561 N.E.2d at 539, 560 N.Y.S.2d at 763.

757. *Id.* (citing People v. Glover, 57 N.Y.2d 61, 64, 439 N.E.2d 376, 377,

Defendant was charged in a felony complaint with criminal possession of a weapon in the third degree. While being held for indictment by a grand jury, defendant agreed to waive his indictment and proceed to be prosecuted by the SCI. However, the SCI to which defendant plead guilty charged defendant with criminal possession of a weapon in the fourth degree.

Article I, section 6 of the New York State Constitution[758] provides that a person being held for indictment by a grand jury may waive indictment and consent to be prosecuted by a SCI so long as the defendant is not charged with a crime that is punishable by death or life imprisonment, the waiver takes place in open court in the presence of defendant's attorney, is evidenced in writing, and is signed by the defendant. In addition, New York Criminal Procedure Law (CPL) sections 195.10(1) and (2) provide that a defendant may plead guilty to an SCI in lieu of being indicted by a grand jury.[759] CPL section 195.20 provides that "[t]he offenses named may include any offense for which the defendant was held for action of a grand jury and any offense or offenses properly joinable therewith . . . ."[760] Furthermore, the CPL provides that "a defendant is held for the action of the Grand Jury on the lesser included offenses as well as a greater offense charged in the felony complaint."[761] Also, the court in *Menchetti* stated that article I, section 6 of the New York State Constitution contem-

453 N.Y.S.2d 660, 661 (1982)).

758. Section six of article I of the New York State Constitution provides, in pertinent part:

> [N]o person shall be held to answer for a capital or otherwise infamous crime . . ., unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. N.Y. CONST art. I, § 6.

759. *See* N.Y. CRIM. PROC. LAW §§ 195.10(1), (2) (McKinney 1982).

760. *Id.* § 195.20.

761. *Menchetti*, 76 N.Y.2d at 477, 561 N.E.2d at 538, 560 N.Y.S.2d at 762 (citing N.Y. CRIM. PROC. LAW §§ 190.65, 210.20(1)(b), .30(1) (McKinney 1982 & Supp. 1991)).

plated that the "information may not mirror those [charges] in the complaint and thus requires that the written waiver expressly state the charges to be included in the information."[762] Therefore, because the SCI is a time saving device in that it serves to bypass grand jury proceedings, the SCI may include any offense in the felony complaint. In other words, any combination of offenses originally charging the defendant in a complaint may appear on an SCI and serve to persuade the defendant to plead guilty to the SCI rather than participate in the often time consuming procedure of a grand jury indictment. Because the defendant was also held for grand jury action on the lesser offense automatically included in the felony complaint, the SCI was valid. Furthermore, the court rejected defendant's claim that criminal possession in the fourth degree is not a lesser included offense of criminal possession in the third degree. "[C]riminal possession in the third degree is committed when one 'possesses any loaded firearm' in a place other than his home or business."[763] Criminal possession of a weapon in the fourth degree is committed when he possesses any firearm.[764] "Because it is impossible to commit third degree possession without also committing fourth degree possession[,] fourth degree possession is a lesser included offense of third degree possession."[765]

Federal courts have not directly addressed the issue of whether an information is valid when it charges a defendant with a lesser included offense than that originally charging the defendant in the felony complaint. However, the United States Court of Appeals for the Fifth Circuit has addressed a closely related issue. In *Government of the Canal Zone v. Burjan*,[766] the defendant was convicted after pleading guilty to an information that was subsequently amended without leave of the court. The amended information charged the defendant with a lesser included offense than

762. *Id.* (citing N.Y. CONST. art. I, § 6).

763. *Id.* at 478, 561 N.E.2d at 539, 560 N.Y.S.2d at 763 (quoting N.Y. PENAL LAW § 265.02(4) (McKinney 1980)).

764. *Id.* (quoting N.Y. PENAL LAW § 265.01(1) (McKinney 1980 & Supp. 1991)).

765. *Id.* (citations omitted).

766. 596 F.2d 690 (5th Cir. 1979).

that originally pleaded guilty to by the defendant.[767] The court held that because the defendant failed to object to the amendment before trial, he waived his objection. Further, the court held that amending the information to charge the defendant with a lesser included offense than that originally charged was harmless error.[768] Thus, although the court did refer to such amendment as error, albeit a harmless one, the court disregarded the "violation of Rule 7(e)."[769]

Further, the United States Supreme Court, in *Schmuck v. United States*,[770] has recently settled the question of whether one may be charged with a lesser offense of the charge appearing in the original complaint against a defendant.[771] In making the determination, the Court turned to Federal Rule of Criminal Procedure 31(c), which provides in relevant part, "[t]he defendant may be found guilty of an offense necessarily included in the offense charged,"[772] because they have adopted the "elements test."[773] This test dictates that "one offense is necessarily included within another only when the elements of the lesser offense form a subset of the elements of the charged offense."[774] The Court in *Schmuck* concluded that the elements test "permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge. This approach preserves the mutuality implicit in the language of Rule 31(c)."[775]

Thus, although the United States Supreme Court has not di-

767. *Id.* at 692-93.

768. *Id.* at 693.

769. *Id.* Federal Rule of Criminal Procedure 7(e) provides that "[t]he court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." FED. R. CRIM. P. 7(e) (1989).

770. 489 U.S. 705 (1989).

771. *Id.* at 710.

772. *Id.* at 715 (quoting FED. R. CRIM. P. 31(c) (1989)).

773. *Id.* at 716.

774. *Id.* at 709 (citing United States v. Schmuck, 840 F.2d 384, 387 (7th Cir. 1988), *aff'd*, 489 U.S. 705 (1989)).

775. *Id.* at 718.

rectly addressed the indictment/information issue, the New York Court of Appeals in *Menchetti* is at least consistent with the most recent decision by the United States Supreme Court on the issue of whether the defendant can be charged with a lesser included offense if the elements of the lesser offense are necessarily met by satisfying the elements of the more serious offense.